# Re-forming a meritorious elite

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*Published in:*
Fair reflection of society in judicial systems

*Publication date:*
2015

*Document Version*
Publisher's PDF, also known as Version of record

# Chapter 4
# *Re*-forming a Meritorious Elite. Judicial Independence, Selection of Judges and the High Council of Justice in Belgium

**Maurice Adams and Benoît Allemeersch**

**Abstract** Maintaining the independence of the judiciary against the influence of the legislative and executive powers requires a constant alertness, even more so in our modern societies where the legislative and executive branch are often intimately connected. This article looks into the way this problem is being dealt with in Belgium. It does so from the angle of the Belgian High Council of Justice, created in 2000 to fulfil a key role in establishing and maintaining judicial independence, especially from the political sphere. Since judicial independence, and the way it is reached, cannot be seen in isolation from a broader background, the necessary attention is given to the specifics of the Belgian context that gave rise to the establishment of the High Council, before evaluating the creation of such an institution as a means to guarantee the independence of the judiciary. To evaluate the impact of the establishment of the High Council of Justice, the authors first distinguish four types of judicial independence: individual, internal, extra-institutional and institutional independence. The authors conclude that external monitoring of the judiciary can, in a modern welfare state, be a legitimate policy to be pursued by the legislative and executive powers. The judiciary, as an institution, can thus be held accountable for its performance by means of a High Council. This is partly a matter of checks and balances. At the same time, alertness is required to ensure that under the pretence of checks and balances no new unchecked positions are being taken up. Therefore, the Belgian High Council of Justice should not perform its duties in a vacuum; it should itself be monitored and be held accountable, for example, by the public, by a free press or even by the judiciary itself (e.g., the European Court of Human Rights).

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S. Turenne (ed.), *Fair Reflection of Society in Judicial Systems - A Comparative Study*, Ius Comparatum - Global Studies in Comparative Law 7, DOI 10.1007/978-3-319-18485-2_4

**Keywords** Judicial independence • High Council of Justice • Belgium • Montesquieu • Accountability of the Judiciary

## 1 Setting the Stage: A 'Hamiltonian' Paradox

As the Dutch constitutional scholar Tim Koopmans once observed, one of the prominent characteristics of modern constitutionalism is that it is developing into what he called a bipolar model: the idea of the *Trias Politica*, which has been determinative for the institutional layout of so many democratic states, is changing into a division between the judiciary on the one hand and the legislative and executive bodies on the other.[1] The *Trias Politica* might therefore today be better described as *Duas Politica*. In any case, the legislative and executive powers are in practice so intimately connected that the traditional supervisory function of parliament is less well developed than constitutional theory would have it. As a result, the main characteristic that distinguishes the courts (the judiciary) from the legislative and executive bodies is, or should be, its independence from the legislative and executive sphere.

All this makes the classic statement, in the Federalist Papers, by Alexander Hamilton, one of the founding fathers of American constitutionalism, particularly interesting. Hamilton, it is well known, deemed the judicial power to be the 'least dangerous' branch of government within the *Trias Politica*: 'Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them'.[2] By this he meant that in principle – and optimistically, we add – the judicial power cannot seriously infringe citizens' rights because the courts enjoy neither the legislature's wide law-making powers nor the executive's prerogative to implement policies. Furthermore, Hamilton said, unless the judicial power itself is the sovereign in a state, it is always reliant on the other powers for its finances (power of the purse). It can, moreover, only enforce its judgements with the executive's help (power of the sword). Hamilton astutely observed that '[the judicial power] may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm, even for the efficacy of its judgments.'[3]

[1] T Koopmans, *Courts and Political Institutions* (Cambridge, Cambridge University Press, 2003) 247–250. This is of course just one way of describing how constitutionally relevant institutions can be looked at. Today we might as well speak about *multiple politica*, where complexity is the watchword: there is an 'increasingly interactive process … taking place in the area of constitutional development between the legislature and judiciary and between national, European and international actors amongst themselves, as well as between actors within the rule of law and those outside', see A Meuwese and M Snel, 'Constitutional dialogue: an overview' (2013) *Utrecht Law Review* 135.

[2] *Federalist Papers*, no 78.

[3] ibid.

Yet, interestingly enough, Hamilton also agreed with Montesquieu who, in his *De l'Esprit des Lois* (1758), stated: 'there is no liberty if the judiciary power be not separated from the legislative and executive [powers]'.[4] And this is why Hamilton at the same time believed that 'all possible care is requisite to enable [the judicial power] to defend itself against their attacks'.[5]

So while Hamilton seemed to diminish the role of the judiciary by calling it the 'least dangerous' of the powers, a branch that was dependent moreover on the goodwill of the two other powers, he did paradoxically at the same time stress its *crucial* importance as an independent actor in establishing a free society.

In this chapter, we will look at how this paradox is being dealt with in Belgium today, i.e., if and how the independence of the Belgian judiciary is maintained and safeguarded against the influence ('attacks', to use Hamilton's word) of the legislative and executive powers.[6] We will do so from the angle of the establishment and working of the so-called High Council of Justice (*Conseil Supérieur de la Justice*, operational since 2000). The High Council is an institution that through various competences is supposed to fulfil a key role in establishing and maintaining judicial independence, especially from the political sphere. The High Council is only concerned with the 'ordinary' judiciary (in civil and criminal matters), and not with the Belgian *Cour Constitutionnelle* or *Conseil d'Etat*. The last two courts will not be dealt with in this chapter. Also, mechanisms to safeguard independence in institutions that perform court-like functions, like, e.g., disciplinary bodies, are not considered here.

To be able to investigate the aforementioned paradox, we will start with devoting ample space to the events preceding the establishment of the High Council of Justice; we are convinced that a legal system, including its institutional and constitutional organisation and layout, can only be fully understood and appreciated if it is also seen as the result of a particular *problem* with which it has to deal. This, it will be shown, also explains why in this chapter the High Council of Justice is the angle through which the topic of judicial independence in Belgium is approached. This also provokes a very important qualification, which might be summarized in the following phrase: 'Do not necessarily try this at home!' In this respect, MacDonald and Kong rightly state that judicial independence is a so-called 'essentially contested concept',[7] which can moreover be reached by differ-

[4] Montesquieu, *The Spirit of the Laws*, in the famous Chapter 6 of Book XI (for an English translation, see http://press-pubs.uchicago.edu/founders/documents/v1ch17s9.html). On this, see E Barendt, *An Introduction to Constitutional Law* (Oxford, Clarendon Press, 1998) 129.

[5] *Federalist Papers*, no 78.

[6] This is a central concern of judicial independence, although not the only one. MacDonald and Kong define judicial independence more broadly as 'judges are independent when they decide by taking into account all relevant considerations, by not considering irrelevant considerations, by not acting to achieve an improper purpose, and by not acting to achieve a purely personal objective', R MacDonald and H Kong, 'Judicial Independence as a Constitutional Virtue' in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford, Oxford University Press, 2012) 832.

[7] This phrase was coined in a seminal paper published nearly 60 years ago by British philosopher WB Gallie. Essentially contested concepts are concepts 'the proper use of which inevitably

ent means: formal and informal mechanisms, institutionalized and customary norms, ex ante and ex post mechanisms, substantive and procedural norms. To an even greater extent, much of the effectiveness of these means relates to, and depends on, the institutional and cultural factors that are central to establishing and promoting what they call 'judicial virtue', a phrase pointing to a number of considerations relating to the actual performance of the role of judge (courage, integrity, etc.).[8] Judicial independence is, finally, always invoked in a specific social, economic, and political context, and what is good for one country might not be good for another. Given all these qualifications, it is wise to read and try to understand the descriptive and taxonomic parts of this chapter, and also its conclusions, in line with the specific context in which the Belgian High Council was established and has to function.

## 2 Some Preliminary History

A decade or so ago, an intense and even vehement debate raged in Belgium, a highly affluent country to be sure, on the legitimacy and independence of the judiciary. The debate started with what became known as the 'Spaghetti judgement' of the Belgian *Cour de cassation*—the highest national court in civil and criminal matters—in which an investigating judge (*juge d'instruction*) was withdrawn from a high-profile case.[9]

The decision was the direct result of the arrest of Marc Dutroux, the perverse murderer of a number of Belgian children. He was arrested on 13 August 1996, after a young girl who had been kidnapped 6 days before was found in the basement of his home, along with another girl who had been there for almost 3 months. It turned out that they had been kept in a hidden cell in Dutroux's house under ghastly conditions. It soon became evident that Dutroux was also responsible for the abduction and death of at least four other children, and for the death of one of his accomplices.

The rescue of the children was at least partly the result of the investigations and interventions supervised by the aforementioned investigating judge, whose efforts

involves endless disputes about their proper uses on the part of their users', WB Gallie, 'Essentially Contested Concepts' (1956) *Proceedings of the Aristotelian Society* 167–198.

[8] MacDonald and Kong, 'Judicial Independence as a Constitutional Virtue' 833 857.

[9] In Belgium a *juge d'instruction* has to prepare a case for both the defence and the prosecution. He leads the judicial investigation, and to that end instructs the police investigators. It is the duty of the investigating judge to gather evidence not only against (*à charge*) but also in favour (*à décharge*) of the suspect. The statutory position of an investigating judge is rather ambiguous, since he is at the same time an officer of the judicial police and a magistrate; he has, after all, to track down suspects and protect the victims against them, which makes it difficult for him to be impartial in this sense. On the other hand, an investigating judge does not have the powers of a judge on the bench; he does not adjudicate cases on their merits and is therefore not an ordinary judge in the regular sense of the word. He neither rules on the guilt of a suspect, nor on the punishment or degree of punishment, or on possible compensation for victims. He only rules on matters related to the investigation.

made him a national hero. It was also clear that the Belgian police had committed major errors, without which the crimes would most likely not have occurred. For example, the police had been present at Dutroux's house while the two girls were still being held there, but had found nothing on that occasion. Moreover, it became known that in 1992 Dutroux had been released from prison after having served a mere 3 years of a 13-year conviction for child rape. And finally, it turned out that the police had been aware for a long time that in 1993 Dutroux had been building cells in his home, which would later be used to incarcerate the children.

Sometime after the aforementioned children had been freed, the investigating judge was invited, together with the public prosecutor, to be a guest of honour at a fundraiser for the defence of one of the victims. One of the two surviving girls also attended. The party was an informal event, had not been broadly publicized, and had been organized by a foundation that sympathized with the victims of child abuse and had itself filed a civil claim for damages against Dutroux. At the party, the investigating judge was offered a meal (a plate of spaghetti) and was presented with a pen that had been bought that evening in a small neighbourhood shop as a kind of improvised gift.

The presence of the investigating judge at this gathering did of course attract media attention, and subsequently, led to Dutroux's lawyer filing an objection notice challenging the investigating judge,[10] questioning his independence and impartiality and seeking his removal. Two weeks later, the investigating judge was taken off the case by the Belgian *Cour de cassation*. According to the Court, by accepting the meal and the gift the investigating judge appeared to be biased in the eyes of both the suspects and the general public. It was therefore impossible for him to perform his task objectively, impartially and independently. The Court more specifically stated:

> …that the essential condition of impartiality of the investigating judge is his complete independence in regard to the parties, so that he does not expose himself to a suspicion of partiality with regard to his examination of the facts, whether it be in favour of the defence or the prosecution; that the investigating judge should not at any moment lose the ability to create in the minds of the parties or in the public opinion an appearance of impartiality; [and] that no circumstance, however exceptional, might relieve him of this obligation.[11]

[10] In this article we shall understand these terms – independence and impartiality – not quite as synonyms, but as closely interrelated terms nevertheless. We do not see independence as an ultimate value in itself, but instrumental in safeguarding another more ultimate value: impartiality, in the sense of having a decision taken by a third person who cannot be considered to have an interest in the case. On this relation, see M Cappelletti, *The Judicial Process in Comparative Perspective* (Oxford, Clarendon Press, 1989) 70–71. A judge who cannot decide a case independently by definition cannot be impartial. The European Court of Human Rights seems to confirm this view, when it says that 'the concepts of independence and objective impartiality are closely linked.' See, eg, European Court of Human Rights*, Kleyn et al v the Netherlands*, ECHR, Nos 39 343/98, 2003-VI (6 May 2003), para 192.

[11] *Cour de cassation*, 14 October 1996, *Arresten Cassatie* 1996, 379 (the Court ratified its decision some months later, on 11 December 1996, in civil proceedings). Translations in this paper are by the authors.

Moreover, the Court said:

> That the investigating judge who has been entertained by one party at this party's expense or has accepted gifts from this party, and has thus shown his sympathy for this party, places himself in an impossible position to conduct the case involving this party without raising with the other parties, the suspect in particular, and third parties, a suspicion in respect of his ability to fulfil his task in an objective and impartial way.[12]

In its rhetorical manifestation, the judgement followed a forceful logic of its own that could not but result in a conclusion that inevitably seemed to follow from the facts. The Court strictly adhered to the letter of the law—or at least gave that impression—intimating that there was no scope for interpretation. At the same time, however, the Court did deal creatively with at least certain aspects of the case. In the opinion of many respected academics and legal practitioners,[13] the Court had made choices that were not legally inevitable. Contested issues included the meaning of the concept of impartiality, the proper function of an investigating judge, and the meaning of Article 828 of the Belgian Judicial Code and Article 542 of the Belgian Code of Criminal Procedure (the legal basis of the Court's decision).

The judgement of the Belgian *Cour de cassation* sent shockwaves of indignation throughout the country. Demonstrations were held, factories went on strike, and editorials condemned the Court decision and, more generally, the cold mentality of the judges. The public outrage culminated in the so-called White March, a demonstration of hundreds of thousands of people (some 3 % of the Belgian population!) marching through the streets of Brussels protesting against the justice system in general and the judiciary system specifically.[14] Popular confidence in the system of justice was at an all-time low.

It is almost ironic that the Court's very argument of judicial impartiality and independence caused an enormous public uproar because of the publicly perceived lack of impartiality and independence of the judiciary. What is more, the political elite was criticized severely for having neglected, financially and otherwise, the justice system for years. For example, well into the 1990s, appointments to the judiciary had an undeniably political dimension. Although formally judges were appointed by the Minister of Justice, each political party could nominate candidates in proportion to their representation in parliament. While the reason for this appointment procedure was that it was thought wise to have a more or less representative judiciary,[15] the result was a rather politicized judiciary, with judges who were not necessarily appointed on the basis of their expertise.

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[12] ibid.

[13] A survey of the legal aspects of the case can be found in W Van Gerven, 'Creatieve rechtspraak' (1997–1998) *Rechtskundig Weekblad* 214–217 and, more generally, in F Delpérée, 'Quelques propos sur la justice et la politique' (1997) *Journal des Tribunaux* 69. Both authors are rather critical of the decision by the *Cour de cassation*.

[14] An interesting sociological analysis of the White March can be found in S Walgrave and J Manssens, 'The Making of the White March: The Mass Media as a Mobilizing Alternative to Movement Organizations' (2000) *Mobilization* 217.

[15] Representative of the available political spectrum that is, i.e., not being fully cut loose from the political sentiments amongst the population. Such a judiciary had been an ardent wish since the

We do not suggest that the Court's decision itself was the fundamental cause of social dissatisfaction, but it was nevertheless the catalyst for popular dissatisfaction with the administration of justice and the judicial system. In the public's opinion, and also partly as a result of its formalistic reasoning style, the Court seemed to pre-empt all discussion and thus turn a blind eye to societal arguments in order to keep the aforementioned investigating judge in place. Many people believed the highest judges of the country to be involved in a political cover-up. To many the *Cour de cassation*, in its judgment, symbolized the problems rampant in the country's justice system: a product of a political system whose manoeuvrings had made it lose contact with 'reality'. As a matter of fact, the popular feeling was that the Belgian judiciary suffered from judicial *de*pendence (on the political branch, to be sure).[16]

The political upshot of all of this was that in April 1998, after Dutroux managed to escape from custody for a few hours, eight Belgian political parties agreed that a fundamental reform of the Belgian judicial system was urgently needed. All this suggests that, lofty constitutional and court-confirmed principles notwithstanding, judicial independence also has a strong sociological component; justice must not only be done, but it must also very clearly and explicitly *perceived* to be done. The shake-up of the Belgian judiciary system was from this point of view necessary to restore the Belgian public's confidence in the judicial system,[17] since that is indeed the bedrock of judicial independence.[18]

One of the most important and direct results of the political agreement to restructure the national system of the administration of justice was the establishment in 1998, by way of constitutional reform, of the High Council of Justice. Elsewhere in Europe, comparable institutions have long been in existence. Italy has had a similar institution since 1947, as has France since 1958 (headed by the President of the Republic), and Spain since 1977. The powers and competences of these authorities differ, but the general aim of all is to restrict the influence of the executive branch on the judicial branch. At the same time, however, the very nature of these councils

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establishment of the Belgian state in 1830. See J Gilissen, 'L'ordre judiciaire en Belgique au début de l'indépendance (1830–1832)' (1983) *Journal de Tribunaux* 596 and J-P Nandrin, 'L'acte de fondation des nominations politiques de la magistrature. La Cour de cassation à l'aube de l'indépendance belge' (1998) *Revue belge d'Histoire contemporaine* 153.

[16] Interestingly, the previously cited Montesquieu advocated judicial independence not only to protect the judiciary from political trespassing, but also to protect the public from judges with too much power! If the judicial power 'were … joined to the executive power, the judge might behave with violence and oppression', Montesquieu, Montesquieu, *The Spirit of Laws*, ch 6 Book XI ('Of the Constitution of England').

[17] Whether the shake-up was successful is an issue that will not be dealt with in this article. Even so, in recent years, popular confidence rate significantly improved. According to recent research, in 2010 61 % and in 2007 66 % of the Belgians said they had confidence in the justice system. Five years before, this was barely two out of five Belgians (41 %), see Conseil supérieur de la justice, *Les Belges et la justice en 2010. Les résultats du deuxième baromètre de la justice en Belgique* (Brussels, Bruylant, 2010) 83.

[18] K Malleson, *The New Judiciary. The Effects of Expansion and Activism* (Aldershot, Ashgate Press, 1999) 78.

poses a *potential* threat to judicial independence**.** After all, one of their tasks is to monitor the performance of the judiciary.

## 3 The Belgian Constitution and Judicial Independence[19]

The answer of the Belgian political class to the problems described in the previous paragraph was motivated by a clearly felt need to get rid of improper political influence on the judiciary and effect change in how the Belgian judicial system was organized. Still, at the same time the Belgian legislature was very much aware of the need for the High Council to be in accordance with principles of judicial independence because – to quote one Senator – 'The independence of the judiciary is the cornerstone of a democratic *rechtsstaat*, and safeguards the separation of powers'.[20]

Before the 1998 constitutional reform, judicial independence as such had not been explicitly guaranteed, although the Belgian Constitution did contain provisions that effectively made judicial independence possible. Article 152 of the Constitution, for example, guaranteed (and guarantees) appointment for life for judges:

> The judges are appointed for life. They are retired at an age determined by law, at which they are awarded a pension determined by law. A judge can only be removed from office or suspended after a judicial procedure. A judge can only be transferred after a new appointment to which he agrees.

Article 154 determines that the salaries of judges are to be set by law, and Article 155 stipulates that judges are not allowed to accept paid positions from the government.

In addition, even before the constitutional reform, judicial independence had been accepted as a legal principle by the Belgian *Cour de cassation* as well as the Belgian *Cour Constitutionnelle*.[21] Judicial independence is also acknowledged in the European Convention on Human Rights (Article 6) and in the International Covenant on Civil and Political Rights (Article 14), to both of which Belgium is a party.

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[19] On this, see, e.g., A Alen and K Muylle, *Handboek van het Belgisch Staatsrecht* (Mechelen, Kluwer, 2011) 599 ff.; F Fleerackers and R Van Ransbeeck, *Recht en Onafhankelijkheid. Gerechtelijke macht in perspectief*, *AdVocare Series* (Brussels, Larcier, 2008); J Velaers, 'De onafhankelijkheid van de rechterlijke macht na de recente herziening van de Grondwet' (2000) *Limburgs Rechtsleven* 373–400 and P Van Orshoven, 'De onafhankelijkheid van de rechter naar Belgisch recht' in P Van Orshoven, LFM Verhey and K Wagner, *De onafhankelijkheid van de rechter* (Deventer, Tjeenk Willink, 2001) 77.

[20] Parliamentary Proceedings, *Senate* 1998–99, no 1-1121/3, 7.

[21] *Cour de cassation* 13 January 1986, *Arresten Cassatie* 1985–86, 665; *Cour d'Arbitrage* 10 June 1998, *Belgisch Staatsblad* 12 September 1998, no 67/98. The Belgian *Cour d'Arbitrage* was renamed *Cour Constitutionnelle* in 2007.

Since the 1998 constitutional reform,[22] judicial independence is explicitly mentioned several times in the Belgian Constitution. For example, § 1 of Article 151 now reads:

> The judges are independent in the exercise of their competency. The public prosecution is independent in its individual investigation, although the competent minister is allowed to order prosecution and to set up binding guidelines of criminal policy, including prosecutorial policies.

The most elaborate change was the introduction of a new Article 151, § 2 in the Constitution, which established the High Council of Justice:

> §2. There is in Belgium one High Council of Justice. This Council respects the independence of the judiciary as mentioned in §1.
>
> The High Council of Justice consists of one Dutch-speaking and one French-speaking college. Each college has an equal amount of members and each consists on the one hand of an equal amount of judges and civil servants of the public prosecution that are chosen directly among their peers… On the other hand the members are appointed by the Senate with a majority of two-thirds of the votes cast…
>
> Within each college there is an appointment and indication committee and one advisory and research committee, with the same balanced composition as above…
>
> §3. The High Council of Justice is competent for:
>
> 1. The nomination of candidates for an appointment as judge… or as a civil servant of the public prosecution;
> 2. The nomination of candidates for the functions of [president of any regular court or the function of chief of the public prosecution].
> 3. Access to the position as a judge or civil servant of the public prosecution;
> 4. Educating judges and civil servants of the public prosecution;
> 5. Setting up standard profiles for the functions mentioned in point 2;
> 6. Providing advice and formulating proposals concerning the working and the organization of the judicial power;
> 7. The supervision of and the advancement of the use of internal control mechanisms;
> 8. With the exceptions of the normal disciplinary and criminal competences:
>
> – Receiving and following-up of complaints concerning the working of the judicial power;
> – Researching the working of the judicial power…

The challenge to maintain and safeguard the independence of the Belgian judiciary against the influence of the legislative and executive powers however, has since become ever more acute in the aftermath of what became known as the Fortis demise.

Fortis was a multinational banking and insurance group which, due to the effects of the financial crises in September 2008 and after the Belgian Government's intervention, was dissolved and sold to a French competitor.[23] Since the shareholders had not been consulted on the sale, summary proceedings were begun before the President of the Brussels Commercial Court (*Tribunaux de commerce*) and, on appeal, before the Brussels Court of Appeal (*Cour d'appel*). Due to a conflict which

[22] Act of 20 November 1998 amending the Constitution, *Belgisch Staatsblad* 24 November 1998.

[23] For an overview of these events (from a corporate and financial law perspective), see 'De zaak Fortis' (2009) 2 *Tijdschrift voor Rechtspersoon en Vennootschap*, 156–158 and 429–430.

arose between the three judges handling the case in the Court of Appeal, one judge refused to sign the judgment, triggering a hectic and confusing series of consultations involving the President of the Court of Appeal, the President of the Court of Cassation, the offices of the Minister of Justice, the Minister of Finance and the Prime Minister and the Prosecutor-General of the Court of Appeal. When judgment was pronounced by only two judges, an unprecedented sequence of events unfolded, where the Minister of Justice resigned after refusing to direct the Prosecutor-General of the Court of Appeal to submit the case for an extraordinary review by the *Cour de cassation*. Soon afterwards, the Government resigned too, after letters from the Prime Minister and the President of the *Cour de cassation* were published that revealed contacts between government officials and prosecutors. The findings of the ensuing special investigations by the Parliament and the High Council of Justice were often critical, revealing a number of gaps in the protection of the judiciary against inappropriate influence by the executive, such as the employment of magistrates as advisors in the cabinets of members of government.[24] These findings established the need for a more thorough scholarly debate on the meaning and extent of judicial independence, as guaranteed by the amended article 151 of the Belgian Constitution.[25]

## 4 Taxonomy of Judicial Independence

Before article 151 of the Belgian Constitution can be assessed, it must be clear what types of judicial independence there are which can function as an evaluative frame of reference. In this section, we will describe four basic types.



[24] Commission of Inquiry, Parliamentary Documents: House of Representatives 2008–2009, No. 52 1711/007, available at www.dekamer.be; High Council for Justice, Report of the special investigation into the functioning of justice following the Fortis case, approved by the general assembly of the Council on 16 December 2009, available at www.hrj.be. For a first discussion of these reports, see M Rigaux, 'Les illusions perdues. Réflexions à propos du rapport de la commission Fortis' (2009) 6347 *Journal des Tribunaux* 221; M Rigaux, 'Le rapport du Conseil supérieur de la justice sur l'enquête relative au fonctionnement de l'ordre judiciaire à l'occasion de l'affaire Fortis' (2010) 6385 *Journal des Tribunaux* 137.

[25] For example, both reports recommend to limit the possibilities for magistrates in function to be hired as cabinet advisors by members of government, but whether this should lead to an absolute ban or not (including the cabinet of the Minister of Justice, where the input of magistrates could be very useful) is matter of dispute.

## *4.1 Individual or Core Independence (A)*

Judicial independence is strongly guaranteed by Article 151 § 1 of the Belgian Constitution, at least as far as the adjudicative function of the *individual judge* is concerned. In this respect, the phrase '[t]he judges are independent in the exercise of their competency' is clear and unqualified: an individual judge must be able to take each judicial decision he or she believes to be correct, without any external pressure. We might call this the individual or core independence of the judge. This type of individual independence is also generally considered to be the most essential aspect of any conception of judicial independence, since it is a necessary condition for judicial impartiality as well. Among scholars and politicians alike, its value and significance for a democratic *rechtsstaat* are beyond dispute.

Interestingly, before the Belgian constitutional reform of 1998, this phrase was *not* part of Article 151. The 1998 constitutional legislature seems to have made a deliberate choice to confine judicial independence to this individual aspect. For example, one Member of Parliament said: '[t]he reform does not infringe upon the constitutionally guaranteed balance of powers, despite what some might say. The independence of the judge will not be impaired. But it will nevertheless be more clearly defined from now on: *it doesn't reach further than the adjudicative function of the individual judge*'.[26] Another Member of Parliament said that the new text of Article 151 should put an end to discussions about the range of judicial independence. 'It means that judges are completely free to decide an individual case'. Significantly he added: 'But there the independence stops'.[27] A contrario it can be said that other aspects of judicial independence should according to this politician not necessarily be guaranteed by the Belgian legislature. The parliamentary proceedings contain quite a few statements that confirm this point of view.

The courts in Belgium seem to understand this type of independence rather narrowly. When the Belgian Minister of Justice once made inquiries about a case that was pending in a Court of Appeal, his behaviour was questioned in court proceedings. The *Cour de cassation*, in its typical language, said that

> '…from the sending through, by the Minister of Justice to the *premier président* [first chairman] of the Court of Appeal of a letter of complaint of one of the parties concerned, about the case as it was dealt with in the Court of First Instance, with the comment [by the Minister] that 'you will form an opinion [on this letter] and inform me'…, it cannot be concluded that the executive power has unduly interfered with the judicial power, nor can it be concluded that the letter by the Minister has been able to impose on the parties the impression that the judge was not independent or prejudiced…'[28]

What is interesting is that the European Court of Human Rights (ECtHR) has never given an abstract or positive definition of judicial independence. It usually only states that judicial organs should be independent of the executive powers and

[26] Chamber of Representatives, 'Parliamentary Proceedings 1997–98', no 1675/4, 19.

[27] ibid, 29.

[28] *Cour de cassation*, 22 June 1998, *Algemeen Juridisch Tijdschrift* 1999–2000, p. 297. On this and other similar cases, see Van Orshoven, Verhey and Wagner, *De onafhankelijkheid van de rechter*.

parties in proceedings,[29] to be able to arrive freely at a judgement, and subsequently only sums up the conditions under which this independence might be guaranteed: the appointment procedure, the time of office, the 'appearance of independence' and the availability of safeguards against external pressure. Yet these factors are merely 'indicative' of independence (and therefore not decisive in themselves).[30] Then again, the ECtHR (or the European Commission for Human Rights for that matter) does not necessarily seem to consider appointment or dismissal of a magistrate by the legislative or executive power an infringement of judicial independence (unless it is arbitrary).[31] Moreover, election for judicial office might be considered to be in accordance with judicial independence,[32] and the fact that a judge is not appointed for life is also not necessarily an infringement of judicial independence.[33]

The ECtHR also seems to accept accountability of the judiciary to external actors or bodies, at least as long as the situation is such that a binding decision cannot 'be altered by a non-judicial authority to the detriment of an individual party…' This is, the Court says, 'inherent in the very notion of a 'tribunal', as is confirmed by the word 'determination' ('*qui décidera*')…'[34]

We believe that the key to understanding the position of the ECtHR is that there should be some formal guarantees that individual justices are able to arrive at a free and independent judgment (these guarantees are indicative of individual independence, but not decisive) and especially that no authority can in any way interfere *directly* with the decision in an individual case. This last condition is the litmus test.

In the remainder of this section, we will describe three more forms of judicial independence. These three forms all focus on the dependencies of the judicial power, i.e., on all the influences that can or might be exerted upon it. These influences can be either *proper* or *improper*. The three types of influences we will be looking at here are the ones exerted by:

[29] cf *Ringeisen v Austria*, European Court of Human Rights, Series A, no 13 (1971) 1 EHRR 455, para 95, and *Le Compte, Van Leuven and De Meyere v Belgium*, European Court of Human Rights, Series A, no 43 (1981) 4 EHRR 1, para 55.

[30] *Campbell and Fell v United Kingdom*, European Court of Human Rights, Series A no 80 (1985) 7 EHRR 165, para 78.

[31] Appointment by legislative power: *Crociani and ors v Italy*, European Commission on Human Rights, 18 December 1980, DR 22, 147 (App no. 8603/79, 8722/79, 8723/79 and 8729/79), para 10. Appointment by executive power: *Ringeisen v Austria*, para 95 and *Campbell and Fell v United Kingdom*, para 78. Dismissal by executive power: *Campbell and Fell v United Kingdom*, para 80 and *Bryan v United Kingdom*, European Court of Human Rights, Series A no 335 (1995) 21 EHRR 342, para 36.

[32] cf *H v Belgium*, European Court of Human Rights, Series A no 127, para 51 (the tribunal in question was a disciplinary commission of a Bar authority, in a disbarment case).

[33] cf *Ringeisen v Austria*, para 95.

[34] See *Van den Hurk v the Netherlands*, European Court of Human Rights, Series A no 288 [1994] ECHR 14, para 45. On all this, see V Van Bogaert, *De rechter beoordeeld. Over aansprakelijkheid en verantwoordelijkheid in civiel- en staatsrechtelijk perspectief* (Maklu, Apeldoorn/Antwerp, 2005) 363–365.

'B': colleagues amongst each other within the judiciary (i.e., internal independence);
'C': external agents, which are not state powers, e.g., the media (i.e., extra-institutional independence);
'D': the other state powers (i.e., institutional independence).

## *4.2 Internal Independence (B)*

Individual independence focuses on how the law tries to ensure the independence of individual judges when fulfilling their core duty, i.e., adjudicating cases. There is nevertheless another dimension to this issue, which can be dubbed *internal* independence. This form of independence deals with the factual sources of influence and control among judges themselves. The question here would be: do judges actually influence each other when they adjudicate cases, and what does this influence amount to? It is, as such, virtually impossible to determine whether or not a judge has really been influenced by his peers or hierarchical superior, unless a judge explicitly admits to having been *im*properly influenced in such a way.

This, however, does not dispense a civil justice system from the duty to implement measures aimed at reducing the risk of improper internal influence. Unfortunately, the Belgian civil justice system has not yet sufficiently complied with this duty. Some structural guarantees to protect judges from improper internal pressure are lacking. For instance, in the current state of Belgian procedural law, the court president enjoys extensive powers in the attribution of judges to certain matters of law, through the assignment of each judge to a specific chamber or department. There is virtually no independent control as to how these discretionary powers are used. There are insufficient guarantees that these powers are not used to sanction a judge, for example a judge who in a certain case may have ruled in a manner that would not be appreciated by his hierarchical superior. The most recent reform of the Belgian judicial landscape further increases this risk of improper internal influence. The reform involves a reduction of the number of judicial districts from 27 to 12, with most of the new districts covering a much larger territory than before. The reform also includes heightened mobility for tenured judges and empowers the court president to transfer his judges from one post to another. The Belgian Council of State (*Conseil d'Etat*) has expressed concern that abuse of this power may expose magistrates to improper influence by their court president.[35] Still, coming up with structural measures to eliminate these *improper* forms of internal dependence, while maintaining the *proper* forms of this type of influence, is easier said than done. Judges need to be protected against random transfers or reassignments, but the justice system also needs to be protected against dysfunctions resulting from inefficient work distribution and idle judges.

[35] Conseil d'Etat/Raad van State, full bench opinion of the Legislative Department, nr 53000/AV/3, Chamber of Representatives, *Parliamentary Documents*, DOC 53-2858/01, 100–105.

A similar dilemma has surfaced in recent case law involving alleged violations by judges of their obligation to uphold professional secrecy and the secrets of judicial deliberation. Under Belgian law, magistrates are required to keep confidential all information relating to a specific case, other than what was disclosed in public hearings and/or in the official judgment after it was delivered. This duty seems to be at odds with principles which stress the importance of consultation and discussion. Today more than ever, it is considered normal that judges collaborate, share their experience and knowledge and confer with each other when confronted with difficult questions of law or fact.[36] Yet, while information sharing may be a way to improve work product quality, for example in terms of exchanging past experiences, or in discussing the substance of a case one is solely in charge of, it may also be considered a violation of the confidentiality obligations imposed on judges. This became clear in the *Fortis* case, which we referred to above, where one justice of the Brussels Court of Appeals – who heard the *Fortis* case in appeal – was convicted on criminal grounds for having shared part of a draft judgment with a retired judge for the purpose of proofreading,[37] and the judge who heard the case in first instance was later convicted on the same grounds for having shared a draft of her judgment with a fellow judge of the same court.[38] Although both of these decisions must be read taking into account the complicated context of the *Fortis* case, these precedents have caused concern among members of the bench. In any case, judges need to be able to seek advice among colleagues (not all interaction is necessarily improper),[39] and the interpersonal mechanisms at work are almost impossible to regulate, supervise or evaluate structurally or effectively.

### *4.3 Extra-Institutional Independence (C)*

The litmus test for extra-institutional independence is whether judges are influenced by other factual sources besides colleagues and other state powers, such as the media. In criminal cases, for example, this might affect the presumption of innocence; judges can then no longer decide independently because their conclusion is heavily determined by an external source. As with internal independence, it is nearly

[36] This is illustrated by the fact that newly constructed court buildings are designed with work places for teams of judges, whereas older court buildings did not even offer office space for individual magistrates.

[37] *Cour d'appel*, Ghent, 14 September 2011, *Tijdschrift voor Strafrecht* 2012, 354 (a motion to reverse – '*voorziening in cassatie*' – was rejected by the *Cour de cassation* in its decision of 13 March 2012, nr AR P.11.1750.N, available at www.juridat.be).

[38] *Cour d'appel* Brussels, 21 January 2013, as yet unpublished.

[39] A hard case seems to be when a judge shows a draft judgment to a fellow judge of the same court (and not so much where the judge shows her draft judgment to someone who is effectively not a judge).

impossible to determine whether or not this has been the case.[40] Understandably therefore, the Belgian *Cour de cassation* seems in this context to work with a 'presumption of independence': unless there is positive or explicit proof of influence, the judiciary and its judges are presumed to be independent of sources such as the media. In a much publicized case in 1998, which dealt with corruption among politicians, the *Cour* simply said that the press coverage 'was not able to influence the Court'.[41]

### *4.4 Institutional Independence (D)*

What is more controversial, however, is the independence of the judicial power from an institutional point of view. As is clear from Article 151 § 2 of the Belgian Constitution, the judiciary as an institution is not totally independent, simply because of the external control that is exercised on it by (or through) the High Council, or directly by the other branches of government. We will come back to this in the next section.

## 5 Pride in the Judiciary and the Role and Function of the High Council of Justice

### *5.1 Objectives, Mission and Composition*

The establishment of the Belgian High Council of Justice in 1998 served two main purposes: introducing judicial accountability and external monitoring of the judicial power (with the aim of trying to improve its quality)[42] and getting rid of improper political influence on the appointment of judges. The main drive behind these two aims, as stated before, was to restore public confidence in the judiciary.

The High Council is composed of a French-speaking and a Dutch-speaking section, each consisting of 22 members, half of whom are magistrates (directly elected amongst magistrates) and the other half non-magistrates (appointed by the Senate).

[40] Perhaps this is all the more so in Belgium which does not really have a tradition of aggressive press coverage in pending legal matters, even though media interest in trial coverage in recent years seems to have increased. Remarkably, in the past ten years, courts have taken a more open attitude towards the press. Most courts have assigned magistrates as press officers, dedicated to answer journalists' questions on pending matters.

[41] *Cour de cassation*, 16 September 1998, (1998) *Journal de Tribunaux* 656.

[42] 'Quality of justice' refers to the degree by which the justice system meets performance and efficiency criteria, such as the speed and cost of the judicial process, see European Commission for the Efficiency of Justice (Council of Europe) (ed), *Terms of reference of the Working Group on quality of justi*ce, Extract from the 2014–2015 Activity Programme of the CEPEJ, www.coe.int/cepej.

Although the High Council is clearly related to the judicial power (since half of its members are magistrates), it is nevertheless not part of it[43]: even though it is included in the chapter of the Belgian Constitution on the judiciary, it does not have any adjudicative functions.

The fact that external control and a sort of involvement was being organized was heavily criticized by the then *premier président* (first chairman) of the *Cour* and Belgium's *procureur général* (chief prosecutor), the two highest-ranking Belgian judicial officers. In an advisory note to the Belgian parliament, they protested against the fact that judicial independence was, in the legislative proposal establishing the High Council of Justice, restricted to adjudicating cases by the individual judge (i.e., the 'A' type of judicial independence). According to the two officers, the Belgian parliament failed to appreciate the importance of institutional independence (type 'D') vis-à-vis the other state powers. They also felt ignored, believing that the judiciary itself should deal with the matter of judicial independence. They came to the conclusion that the composition of the first paragraph of the proposed new Article 151 of the Belgian Constitution (see above) led to ambiguity about judicial independence, and they suggested that this 'might be changed': 'The proposed text can be explained in such a manner that judicial independence is limited to individually adjudicating cases, thereby neglecting the institutional independence of the courts, i.e., the independent position of the courts towards the other powers in the state'.[44] Their protest, however, did not seem to make much of an impression on the political class, as it did not have any impact on the proposed constitutional text.

## *5.2 Judicial Selection*

The High Council plays a pivotal role in the selection of judges in Belgium. Belgium follows the continental European model of a career judiciary. Judges are primarily recruited from junior legal professionals who go through additional judicial training but also, though to a lesser extent, from more senior legal professionals who, apart from their professional experience, have demonstrated their skills in an entrance exam. Judicial appointment is within the purview of the High Council of Justice and the executive branch. In a two-stage procedure, applicants first have to demonstrate their eligibility by means of a judicial examination and may then apply for nomination. In both of these stages, the key role for the High Council of Justice is setting out the content of the exams and conducting the hearings for nominations. The executive branch comes in only when the appointment has to be formalized, upon nomination by the High Council of Justice.

[43] On this, P Van Orshoven, 'De staatsrechtelijke positie van de Hoge Raad voor de Justitie' in M Storme and J Laenens (eds), *In de ban van Octopus – Dans l'encre d'octopus* (Brussels, Bruylant, 2000) 7–8.

[44] Note by IE Liekendael and P Marchal, 'Het grondwettelijk statuut van het Hof van Cassatie' in Chamber of Representatives, 'Parliamentary Proceedings 1997–98', no 1675, 62.

Eligibility for the office of magistrate of the bench is strictly circumscribed in the Belgian Judicial Code, which is the main official legislation on legal proceedings and organisation of the judiciary. For all positions on the Bench, a candidate must be proficient in the Belgian official languages and hold a Master of Laws degree or a PhD in law. The law does not provide for quotas or any special procedures for women, minorities or the disabled.[45] As just said, it is moreover necessary to pass a professional exam to become eligible.

There are, more specifically, three pathways to entering the judiciary, which depend on the level of prior professional experience. For candidates with little legal professional experience, there is a written and oral comparative entrance exam for judicial traineeship. The number of vacant positions for judicial trainees is determined every judicial year by a Royal Decree in Council. The Minister of Justice appoints the trainees in the order of their results in the comparative entrance exam. There are two types of judicial traineeship, namely the short traineeship of 18 months that leads only to a position with the Public Prosecutor's Office, and a long traineeship of 3 years, which allows appointment either to the Public Prosecutor's Office or to the Bench. A judicial traineeship includes a theoretical component organized by the recently established Institute of Judicial Training (*Instituut voor gerechtelijke opleiding* / *Institut de formation judiciaire*). It also provides for practical experience with the Public Prosecutor's Office, the prison service, the police, the Federal Prosecutor's Office, and a notary or a bailiff, or the legal department of a public economic or social institution. In the long traineeship, there is, in addition, practical training with a trial court. During the traineeship, the trainee is under the supervision of two magistrates of the court or public prosecutor's office, where he or she is training, who evaluate his or her performance. Moreover, all judicial trainees are evaluated by a commission for the evaluation of judicial traineeship, which is composed of magistrates and education experts.

For experienced lawyers, there is a professional capabilities exam. This exam is similar to the one described above, but provides direct access to the judiciary without the need to complete a traineeship. The candidates who pass the exam obtain a certificate of professional ability, which gives them the right to apply for a judgeship within a period of 7 years.

For lawyers with a minimum of 20 years' practice at the Bar who want to enter the Bench, there is an oral evaluation exam. This involves a meeting with three hearing groups drawn from the nomination and appointments committee of the High Council of Justice. Discussions deal with the motivation of the candidate and his ideas about his future career, his knowledge of the law, and his abilities relevant to the function of a magistrate. The nomination and appointments committee gives its

[45] Statistics published by the Ministry of Justice show that the proportion of women amongst magistrates has increased significantly. In 2006, the Ministry counted approximately 1,050 female magistrates and 1,350 male magistrates. By 2011, the balance was approximately 1,200 women against 1,275 men (FOD Justitie, *Justitie in cijfers 2012*, 9, available at www.just.fgov.be). The Ministry does not publish records on the number of magistrates according to other criteria, such as disability, sexual orientation or ethnicity.

decision on the basis of the reports of the three hearing groups and the advice of a representative of the Bar. If successful, the candidate obtains an evaluation attestation, which is valid for 3 years. The maximum number of judges recruited by means of the oral evaluation exam is 12 % of the total number of magistrates at the level of the Court of Appeal in the relevant judicial district.[46] In recent years, the High Council has continued to improve this process to make it as professional as possible. For example, new exam forms have been developed, behavioural interview techniques have been introduced and research has been undertaken on the use of innovative psychological tests.

Similar to the eligibility requirements, the process of the actual selection of magistrates among eligible candidates is also regulated in quite some detail in the Belgian Judicial Code, which is the main official legislation on legal proceedings and organisation of the judiciary. It is required that each vacancy for the position of judge is published online. Previously, judges were in principle appointed directly by the executive branch, which led to the politicization of these appointments. The creation of the High Council of Justice in 1998 has curtailed the responsibility and the powers of the executive in respect of the appointment of judges. Though judges continue to be appointed by the executive branch, the relevant appointments committee of the High Council of Justice bases the appointment on a motivated nomination of the candidate after an evaluation of competence and qualification. The nomination can only be made with a two-thirds majority. The executive branch can reject the nomination, but is required to state its reasons for doing so. The High Council then has 15 days to issue a new nomination. There are no data available on the frequency of rejection, but it is said to happen rarely, if ever. After the 1998 reforms, the High Council almost immediately acquired a moral authority in the selection process that the executive branch is very reluctant to challenge.

While the reform is broadly approved, critics say that there is still a degree of political and ideological influence in the nomination and promotion process, and that the transparency of the nomination process is still subject to improvement. Their concern is centred around the composition of the High Council. Half of its members are, as we have already seen, representatives of the magistrates, both of the bench and the prosecutor's office, and are appointed in an official election among the magistrates. The other half of its members are appointed by the Senate (with a two-thirds majority).[47] Critics have expressed a double concern about the appointment process.[48] On one hand, the procedural guarantees for a fair election

[46] This maximum is set relatively low, to ensure sufficient job openings for the younger, less experienced candidates entering the judicial career through the judicial traineeship programme.

[47] The Senate has full discretion of appointment but is bound by a number of criteria. The Senate appoints candidates who are not magistrates and there are quotas for language (50/50 Dutch- and French-speaking, with at least 1 magistrate with sufficient knowledge of German) and sex (at least four women in each language group), as well as professional qualification (e.g. at least four lawyers with min. 10 years of experience at the bar and at least three university professors).

[48] J Nolf, 'Vertrouwen: het sleutelwoord verdwijnt', *De Juristenkrant* (26 September 2012), 11.

of representatives by the magistrates are insufficient, as no independent body exists to supervise the election process. On the other hand, the appointment of non-magistrates by the Senate creates the potential for indirect political influence on the functioning of the High Council. This risk was highlighted last year when the Council was renewed and the Senate appointed a former Minister of Justice as well as the wife of a former Minister and Euro-Commissioner. Observers indicated that this development might lead to political or ideological labels influencing the Council's assessment of applicants. It is difficult to evaluate these comments due to the confidentiality of the selection process, which is based on the candidates' right to privacy. However, when recently questioned by the specialized press about these concerns, former members of the High Council stated, without exception, either that they had never observed any political or ideological influence or, alternatively, that even when they suspected some bias, the diversity in the selection committee and its vast autonomy turned out to be a more than sufficient guarantee of objectivity in the outcome. They added that full objectivity is utopian and that 95 % of fully objective nominations is in any event the highest attainable level.[49] The result of the process in the last 10 years, with highly qualified lawyers being selected and its outcome relatively rarely contested, seems to support these statements.

The appointment of lay judges in the labour and commercial courts, where they assist professional judges,[50] is still largely within executive discretion. There is no nomination by the High Council of Justice and no formal assessment.[51] This is problematic, as lay judges have an important stake in the judicial activity of labour and commercial courts where they outnumber professional judges two to one. The lack of an objective system for the appointment of lay judges was painfully exposed in the aftermath of a recent highly publicized controversy in the country's most important commercial court, the Commercial Court of Brussels. In the context of an investigation into possible professional misconduct by the President of the Brussels Commercial Court, the popular press published revelations about an important creditor of the President having been appointed a lay judge (and later also a judicial expert) at the same court. It was suggested that the President had secured this appointment for her creditor. It is unclear whether any improper misconduct had really occurred, but the story did cast doubt on the objectivity and thoroughness of the selection process for lay judges.

[49] B Aerts and R Boone, 'Hoge Raad voor de Justitie na 10 jaar. "95 procent objectieve benoemingen is het hoogst haalbare"' (2010) 207 *De Juristenkrant*, 8–9.

[50] Usually, one professional judge presides the chambers, with two lay judges as deputies. The lay judges have equal saying in the decision-making process, although most often the professional judge is likely to be the most influential.

[51] For lay judges in the labour courts, the appointments are made on the basis of endorsements made by the representative organisations of employers on the one hand and of the trade unions on the other (Art 199, Judicial Code). For lay judges in the commercial courts, applications are open to every candidate who is minimum 30 years old and has at least 5 years of business experience.

## 5.3 Other Responsibilities of the High Council

The High Council also has many what might be called administrative tasks. For example, within each (legally required) language group there is an Appointment and Indication Committee as well as an Advice and Research Committee. The former advises on candidates for judicial positions, for court presidencies and for the position of Chief Prosecutor. When someone is nominated for such an appointment, the King (in effect the Minister of Justice) has to approve the candidate. The latter committee can provide advice (and do research) on what is in article 151 § 3 (6) vaguely described as 'Providing advice and formulating proposals concerning the working and the organization of the judicial power'. It can do so either on its own initiative or at the request of the Chamber of Representatives, the Senate or the Minister of Justice.

For the rest, the High Council sets the standards of access to a position as judge or prosecutor (and organizes the entrance exams); sets guidelines for and organizes judicial training programmes; provides additional training for magistrates; and defines profiles for court presidents and the Chief Prosecutor. Finally, and importantly, the High Council can also deal with complaints about the performance of the judiciary.

Given all these tasks, Montesquieu would probably have classified the High Council as being part of the executive power. Yet, the Belgian parliament has repeatedly stressed that the High Council cannot be considered part of any of the traditional powers of the state. It would therefore seem to be a *sui generis* institution.

## 5.4 Impact on Judicial Independence

Which of the Council's duties do or could infringe on judicial independence? The starting point of our analysis here remains that the concept of individual or core independence must be guaranteed at all times. Three types of external control might be distinguished: (1) *improper* external control, i.e., external control that clearly infringes individual independence; (2) *borderline* external control, i.e., external control whose influence on individual independence can be, in practice, both proper and improper; and (3) *proper* external control, i.e., external control that clearly does not infringe individual independence.

As far as *improper* external control is concerned, the provisions of the Belgian Constitution referred to do not seem to contain instances of external interference that are clearly or necessarily improper from the outset, i.e., external interference that can alter or direct an individual decision.

We can also be fairly brief about *proper* external control. The first five duties assigned to the High Council (through Article 151 § 3, subparagraphs 1 through 5 of the Belgian Constitution, see above) appear to be rather unproblematic. One might be critical of the judiciary's loss of power to appoint chief judges itself (this

now falls to the Minister of Justice (formally the King) on the advice of the High Council), but when the courts were in possession of this power, they appointed judges solely by seniority, regardless of any management capacities.

On the basis of Article 151 § 3 (6) of the Belgian Constitution, the High Council is competent to give advice and formulate proposals on how the judiciary works, on legislative proposals concerning the judiciary, and on how the judiciary should be funded. Of course, when its advice and proposals are followed up, the Council can be said to have an influence over the *working conditions* of individual judges (although not directly on the decisions rendered in specific cases).

Yet, since half of the High Council consists of magistrates that have been co-opted by their peers, the High Council can also be understood as a self-regulatory body. That might in practice diminish the risk of the High Council readily infringing upon the individual independence of the judiciary; the judiciary might indeed, as elites usually do, see an interest in preserving its established position (more on this in the next section). But at the same time, complete institutional independence is virtually impossible in practice because the judicial power has always, and necessarily so, been dependent on the other powers of the state (in terms of salaries, financial means, buildings, books and secretaries, recruitment, etc.). We add that, because of its mixed composition, the High Council can be understood as the voice of the judiciary *vis-à-vis* the legislative and executive powers – an example of *démocratie participative*.[52]

As far as *borderline* external control is concerned, two of the High Council's tasks are particularly interesting here. The first of these is the Council's power to supervise the internal mechanisms of control (Article 151 § 3 (7)), the second the Council's exclusive right to receive and follow up on complaints about how the judiciary operates (Article 151 §3 (8), first line). In both cases it seems to be important that the High Council exercises restraint in performing its duties. Both tasks have the potential to develop from *borderline* external control to *improper* external control. To be more precise, the substance of complaints about individual cases should in no way be influenced by external control.[53] Article 151 § 3 (8) therefore also stresses that whenever the High Council receives complaints or information relating to disciplinary or criminal proceedings, it has to forward this information to the proper institutions.

Our conclusion is that the monitoring of the judiciary by the High Council of Justice is from a legal perspective a form of proper external control, but that some of the Council's duties call for vigilance to ensure that they do not infringe individual judicial independence. This finding is of particular concern in the light of

[52] D De Bruyn, as quoted by Velaers. 'De onafhankelijkheid van de rechterlijke macht na de recente herziening van de Grondwet'.

[53] This was also stressed in the parliamentary proceedings. See Chamber of Representatives, 'Parliamentary Proceedings 1997–98', no 1675/1, p. 8–9, and Senate, 'Parliamentary Proceedings 1998–99', no 1-1121/3, p. 8. See also Velaers, 'De onafhankelijkheid van de rechterlijke macht na de recente herziening van de Grondwet'.

questions about the Council's political neutrality, as raised by observers.[54] Some further thought should be given to how this 'fourth power', as it is called by some,[55] could be subjected to sufficient control without seeing its independence compromised. This being said, the Council could certainly do more to reassure its critics by showing more transparency in respect of its functioning, addressing concerns about its neutrality in a public debate and showing more self-criticism when it comes to evaluating its own performance.

## 6 Eliminating Prejudice: Why External Control on the Judiciary Might Be Viable

The question remains why some seem to advance a very broad and unqualified definition of judicial independence, one not limited to individual independence but also encompassing institutional independence. It was exactly this stance, as we related earlier in this article, which was adopted jointly in Belgium by the two highest judicial officers of the country. The answer might well be that, like any powerful elite, the judiciary has its own established interests to protect which might be threatened by the introduction of greater accountability.[56] This, however, does not change the fact that the concerns voiced by these two judicial functionaries are in principle legitimate. The point here is merely that their arguments can be used as a trump card against *any* change (with the accompanying poor reflection on its working laying ahead).[57]

As we have argued, and contrary to the view of these two high-ranking magistrates, the external monitoring of the judiciary as performed by the High Council is not necessarily a *legally* improper infringement of judicial independence. But much depends on how judicial independence is defined and understood. If it is considered to be an individual requirement, external accountability (through, for example, an institution such as a High Council of Justice) might well be compatible with judicial independence. The advantage of a definition of judicial independence that focuses on individual independence (as in the definition we endorse here) is therefore that it allows judicial accountability play a role.[58] Formulated like this however, this clearly is merely a semantic argument. The real question is of course whether such a definition and its related judicial accountability are a good thing. To put it differently: what reasons are there to hold the judiciary in Belgium *as an institution* publicly accountable?

Aside from the fact that there seemed to be a need for this in Belgium after the events described in paragraph 2, an important – more general – reason for this is that

[54] Nolf, 'Vertrouwen: het sleutelwoord verdwijnt'.

[55] ibid.

[56] K Malleson, *The New Judiciary,* 78.

[57] ibid.

[58] ibid.

in the last decades, the courts have, almost involuntarily, been playing an increasingly important role in society. The courts have found themselves ever more drawn into counterbalancing an overbearing bureaucratic machinery. This development is mainly the result of the increasingly intensive legislative and regulatory action on the part of the public authorities. Today, legislation and public policy are largely viewed as instruments to achieve social, economic and cultural change. Moreover, the rise of the welfare state, as well as various developments in the realm of science and technology, have compelled the authorities to intervene. They have come to take on a more active role not only out of choice, but also out of dire necessity. The growth of legislation governing the environment, casual work, the multicultural society, new social risks or biotechnical developments are all examples of this trend.

In this context it is fair to say that the law is also increasingly linking complex sets of interests in ever more complex situations, and in an ever more multi-level globalising legal order. As a result, the courts can no longer confine themselves to applying the legal rule which expresses the various interests as weighed by the legislator. They are increasingly expected to weigh the interests in question themselves.[59] More and more, the courts have to derive from the available rules the standards – think of principles of proper administration, but also demarcations of responsibilities, discretionary powers, vague rules, etc. – on the basis of which they must assess the extent to which particular interests are being legally protected. One need only consider court decisions relating to, for example, strikes, closures of businesses, the economic crisis, disputes concerning environmental and consumer protection. From this perspective, the resulting judicial dynamic is an essential element in enabling the legal system to operate satisfactorily as a forum for organising social trends and relationships, and as a mechanism for the resolution of the conflicts to which these trends and relationships can give rise.

In view of this development, the call for greater accountability by means of external control is understandable and might even be reconcilable with a modern view of the *Trias Politica*. The *Trias Politica* is usually attributed to Montesquieu.[60] It is supposed by many that Montesquieu used this doctrine to advocate the division of state power into a legislative, an executive and a judicial power and that these three powers should be kept *separate*.[61] As a result, each power must be vigilant that the other two powers remain within the bounds of their constitutional authority. However, what Montesquieu desired was not so much the *separation* of powers. More than anything else, he focused on the principle of moderate governance (*gouvernement modéré*), whereby the exercise of power by each branch of government would proceed along different levels, and where each of the branches could then

[59] EMH Hirsch Ballin, 'Onafhankelijke rechtsvorming' in *Rechtsstaat & Beleid* (Zwolle, Tjeenk Willink, 1991) 296.

[60] John Locke (1632–1705) of course defined an earlier version of the idea of *Trias Politica*, in which the judicial power was part of the executive.

[61] C Eisenmann, 'La pensée constitutionnelle de Montesquieu' in B Mirkine-Guetzévitch and H Puget, *La pensée politique et constitutionnelle de Montesquieu: bicentenaire de L'esprit des lois* 1748–1948 (Paris, Recueil Sirey, 1952) 133.

keep the other branches sufficiently in check to avoid arbitrariness and the excessive exercise of state power.[62]

At this point, two assertions can be made: (1) the judiciary can act as an autonomous *counterweight* against an overbearing legislature in an ever more complex society; and (2) the judiciary itself should be held accountable for its growing role in society. Such an approach sits well with the idea that the judiciary can under the aforementioned circumstances best be perceived as a *compensating actor*, which can make good an imbalance when it arises, because of the foregoing, in the relationship between the state and its citizens. It also sits well with a concept of the *Trias Politica* that is not an abstract one, but an essentially relational one. How the *Trias Politica* should be understood in a specific situation is dependent on how the state powers perform their tasks, how in effect they relate to each other. In the context of this chapter, this means that when the judiciary becomes a more autonomous and dynamic actor as a result of the developments we just described, this should also imply greater accountability of the judiciary towards the society in which it functions; the *Trias Politica* as a system of compensating strategies. So if the judiciary is getting and taking more adjudicative liberty, it should also pay up in terms of responsibility towards the society it is serving. In any case, autonomy and responsibility come with accountability, and independence is not the same as being untouchable. That might well be, in this context, an important lesson to be learnt from Montesquieu. Increased accountability might also be conducive to public support for the judiciary. And this is very important indeed because a judiciary that is not supported by the public it is meant to serve can itself endanger the democratic state of affairs, as the Belgian Dutroux case, with which we dealt in Sect. 2 of this chapter, so clearly showed.

Seen from this angle, the two highest judicial officers in Belgium, as referred to above, do not seem to have been aware of the changing environment the judiciary is working in. It seems that they want to understand judicial independence from some fixed or absolute point of view ('judicial independence can only sensibly exist if it is understood as to encompass institutional independence too'). But in times of scarcity of public means, a call for accountability is also about what we might call the positive obligation on the part of the legislator to make the modern *rechtsstaat* work. Quality control is an element in this. From this point of view, it might well be that the legislator should be held responsible for this: it might in any case in Strasbourg be difficult to explain that the possible malfunctioning of the judicial sector results from the lack of a system of quality control.[63]

[62] W Witteveen, *Evenwicht van machten* (Zwolle, Tjeenk Willink, 1991). To avoid misunderstanding: Montesquieu can be interpreted in different ways here. Also critically on the idea of *Trias Politica* as *separation of powers*, see I Stewart 'Montesquieu in England: His 'Notes on England', with Commentary and Translation' (2002), available at: http://ouclf.iuscomp.org/articles/montesquieu.shtml

[63] AFM Brenninkmeier, 'De reorganisatie van de rechtspleging en de onafhankelijkheid van de rechter' (2002) *NJCM-Bulletin* 24.

## 7 Final Remarks

We submit that from a legal as well as a societal point of view the judicial reform in Belgium involving the establishment of the High Council of Justice is not necessarily problematic. External monitoring of the judiciary can, in a modern welfare state, be a legitimate policy to be pursued by the legislative and executive powers. The judiciary, as an institution, can be held accountable for its performance. We add that this can even be seen as a guarantee of independence against the political branches of government. Mechanisms that seek to promote professional qualities are also an essential means for the new judiciary to demonstrate its democratic legitimacy. This is also the key to retaining and strengthening public confidence in the judiciary, which in turn would reinforce judicial independence.[64]

All this does not mean that a dynamic High Council of Justice is always unproblematic. One of the reasons for this has been touched upon in the introduction of this chapter: the establishment of an institution like the Belgian High Council is intimately bound to highly contextual circumstances, and what is good for one jurisdiction or country might thus not be good for another. But even when it could be sensible to establish such a council, than it is still true that alertness is required to ensure that under the pretence of checks and balances no new unchecked power positions are being taken up. This, too, is a lesson to be learned from Montesquieu. Therefore, the Belgian High Council of Justice should not perform its duties in a vacuum; it should itself be monitored and be held accountable, for example, by the public, by a free press or even by the judiciary itself (e.g., the European Court of Human Rights).[65]

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[64] Malleson, *The New Judiciary*, 78.

[65] Supervision by the Belgian Constitutional Court or the *Conseil d'Etat* is of course also necessary, although this will not necessarily take away all concerns, as both of these institutions are composed of members appointed by either the Parliament or the executive. This only confirms the importance of supervision by the European Court of Human Rights.

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